Filed 1/28/10 A.B. v. S.B. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

A.B., Appellant, v. S.B., Respondent.	D054434 (Super. Ct. No. ED67174)

APPEAL from a judgment of the Superior Court of San Diego County, Alan B. Clements, Commissioner. Affirmed.

I

INTRODUCTION

Appellant A.B. appeals from a postjudgment order denying her request to move her son's residence from San Diego County to Riverside County. On appeal, A.B. contends that as her son's primary caretaker, she had a presumptive right to change his

residence. She further contends that in denying her request, the trial court failed to make findings as required by *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072 (*LaMusga*).

We conclude that even if A.B. did have a presumptive right to change her son's residence, the trial court could reasonably have found that this presumption was overcome when the child's father, S.B., established that the move would be detrimental to the child. Once detriment was established, the trial court possessed wide discretion to determine whether a change in custody would be in the child's best interests, in light of the proposed move. The trial court exercised that discretion and determined that a change in custody would be in the child's best interest. The court did not abuse its discretion in reaching this conclusion.

We reject A.B.'s contention that the trial court failed to properly follow the authority of *LaMusga* in making its custody determination. According to A.B., although the trial court stated that it had considered all of the factors outlined in *LaMusga*, the court's statement was "not a finding on those factors." However, *LaMusga* requires only that a court *consider* the factors; it does not require that a court make any particular findings with regard to those factors. Further, the trial court did make findings that support its ultimate conclusion that a change in custody would be in the child's best interest, if A.B. decided to move out of San Diego County. We therefore affirm the trial court's custody order.

II

FACTUAL AND PROCEDURAL BACKGROUND

A.B. and S.B. had a son, B.B., in 1999. A.B. and S.B. were not married. In March 2006, after A.B. and S.B. had ended their relationship, S.B. filed a petition to establish a parental relationship with B.B. A.B. acknowledged that S.B. was B.B.'s father in her response papers.

On December 22, 2006, the trial court filed its "Findings and Order After Hearing."[1] At that time, the court essentially continued the child sharing plan to which the parties had earlier stipulated. The court ordered that the parents were to share joint legal custody. A.B. was given primary physical custody, and S.B. received visitation pursuant to the following schedule: "a) [e]very Wednesday from after school until 8:00 p.m.; b) [a]lternate weekends from Friday after school until Sunday [at] 6:00 p.m.; and c) on the alternate or "off" week, from Friday after school until Saturday [at] 10:00 a.m. . . . ." The court also adopted a number of recommendations concerning the sharing of various rights and responsibilities with regard to B.B. that were set forth in a May 5, 2006 Family Court Services (FCS) report. Finally, in response to A.B.'s contention that S.B. was using marijuana, the court granted A.B. the ability to make up to three demands over a six-month period that S.B. submit to drug testing, and ordered that S.B. would have to comply within 24 hours.

---

1 The court had apparently held a contested hearing as to custody and support issues in July 2006, although the record does not contain documents or a transcript related to that hearing.

On October 29, 2007, the court entered a judgment that provided for a different custody arrangement. The judgment provided that A.B. and S.B. were to "share joint physical custody of the child in the following manner: [¶] a. On alternate weeks, the father shall have care of the child from after school on Thursday until Sunday at 6[:00] p.m. beginning July 26, 2007. [¶] b. Every other week (following his weekend with the child), the father shall have care of the child from after school Thursday until return to school Friday morning beginning August 2, 2007. [¶] c. Every other Monday (following the mother's weekend with the child), the father shall have care of the child from after school until return to school Tuesday morning beginning August 6, 2007." The exchanges were to occur at 8 a.m. and at 3 p.m. on days when school was not in session. The judgment also provided for a child sharing schedule for holidays.

The judgment included the following provision:

> "Neither parent shall move the residence of the child out of San Diego County without giving the other parent a 45-day advance written notice and obtaining the other parent's written permission prior to the move or an order of the Court granting the move."

On June 17, 2008, A.B. filed an order to show cause (OSC) seeking to modify the child custody arrangement, to change B.B.'s residence from San Diego to Murrieta, in Riverside County, California. A.B. initially moved on an ex parte basis, and requested that she be permitted to temporarily move B.B. to Murrieta until the court resolved the move-away issue. The court denied A.B.'s ex parte request and scheduled a hearing for July 29.

On July 11, A.B. and S.B. participated in an FCS mediation conference, but were unable to reach agreement as to a custody sharing plan. During the mediation, A.B. indicated to the FCS mediator that she had already purchased a home in Murrieta. S.B. told the FCS mediator that he was requesting a change in custody that would make him the primary caregiver and would provide A.B. with the visitation schedule that she was proposing for him. On August 4, in his responsive declaration to A.B.'s order to show cause, S.B. made a formal request for a change in the child sharing arrangement in the event that A.B. relocated to Murrieta.

The trial court held a hearing on A.B.'s move-away request on August 8. The court heard testimony from A.B. and from A.B.'s father. S.B. elected to rely on declarations and other written evidence, and did not testify or present other witnesses. In his declaration, S.B. recounted that he and A.B. had lived together and had shared equally in B.B.'s care until they separated in June 2005. S.B. indicated that he continues to be involved in B.B.'s school and classroom activities, and that he helps B.B. with his homework. S.B. also stated that he had volunteered in B.B.'s first grade classroom approximately twice a week, that he had volunteered in B.B.'s second grade classroom, where he had been designated the "class room parent," once a week, and that he had assisted in other school-related activities as well.

On August 11, the court orally informed the parties of its decision to deny A.B.'s request to move B.B.'s residence out of San Diego County. The court ordered that if A.B. decided to remain in San Diego County, the court would not order any changes to the child sharing arrangement. However, if A.B. did decide to relocate to Murrieta, the court

would give S.B. primary custody of B.B. A.B. requested that the court prepare a statement of decision. The court directed A.B.'s attorney to submit a request for a statement of decision in writing, and to include in the request the controverted issues that counsel wanted the court to address. The court indicated that it would then request that S.B.'s attorney prepare a proposed statement of decision, to which A.B. could object, and that the court would thereafter prepare a final statement of decision.

A.B. filed her written request for a statement of decision on August 21. The court ordered S.B. to prepare a proposed statement of decision, which S.B. filed at the end of August. A.B. filed objections to certain portions of S.B.'s proposed statement of decision.[2]

On October 10, 2008, the trial court issued its statement of decision. The court reaffirmed its oral ruling of August 11, denying A.B.'s move-away request on the ground that the proposed move would result in substantial detriment to B.B. The court again ordered that if A.B. elected to reside in San Diego County, the existing orders pertaining to custody and visitation would remain in effect. However, if A.B. elected to relocate to Riverside County, the court would modify the existing orders to give S.B. primary physical custody of B.B., and give A.B. custody over most weekends and school breaks, including the summer recess.

---

2 The Appellant's Appendix includes a copy of A.B.'s objections. However, the document is not signed by A.B.'s attorney, nor does it bear a file-stamp indicating that it was filed with the court. The Respondent's Appendix includes a copy of a different set of objections to the proposed statement of decision. This document is also not signed by A.B.'s attorney, and does not bear a file-stamp indicating that it was filed with the court.

On November 4, A.B. filed a motion for reconsideration of the order. The trial court denied the motion for reconsideration, and suggested that A.B. file a motion to modify the custody order.

A.B. filed a timely notice of appeal on January 5, 2009.

III

DISCUSSION

On appeal, A.B. argues that, as B.B.'s primary caretaker, she had the presumptive right to change B.B.'s residence. She further contends that the trial court failed to make findings in support of its order changing custody, as required by *LaMusga*. We conclude that the trial court applied the proper legal standards and followed the requirements of *LaMusga* in reaching the conclusion that a change in custody would be warranted if A.B. were to proceed with her proposed move. We further conclude that the court did not abuse its discretion in making this determination.

"Once the trial court has entered a final or permanent custody order reflecting that a particular custodial arrangement is in the best interest of the child, 'the paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—weigh heavily in favor of maintaining' that custody arrangement. [Citation.]" (*In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 956 (*Brown*).) "In recognition of this policy concern, [the Supreme Court has] articulated a variation on the best interest standard, known as the changed circumstance rule, that the trial court must apply when a parent seeks modification of a final judicial custody determination. [Citations.]" (*Ibid*.)

"Under the changed circumstance rule, custody modification is appropriate only if the parent seeking modification demonstrates 'a significant change of circumstances' indicating that a different custody arrangement would be in the child's best interest. [Citation.] Not only does this serve to protect the weighty interest in stable custody arrangements, but it also fosters judicial economy. [Citation.]" (*Ibid*, fn. omitted.)

"When a final judicial custody determination is in place . . . , and a noncustodial parent seeks to modify custody in response to a proposed relocation, the trial court must apply the changed circumstance rule." (*Brown, supra*, 37 Cal. 4th at p. 959.) "Although the noncustodial parent is not required to show a custody modification is 'essential' to prevent detriment to the child from the planned move, he or she bears the initial burden of showing that the proposed relocation of the child's residence will cause detriment to the child, requiring a reevaluation of the existing custody order. [Citations.]" (*Id*. at pp. 959-960.) " 'In a "move-away" case, a change of custody is not justified simply because the custodial parent has chosen, for any sound good faith reason, to reside in a different location, but only if, as a result of relocation with that parent, the child will suffer detriment rendering it " 'essential or expedient for the welfare of the child that there be a change.' " ' [Citation.]" (*Id*. at p. 960.)

In the case where a noncustodial parent makes the required initial showing of detriment, the trial court must proceed to the second part of the analysis, "perform[ing] the delicate and difficult task of determining whether a change in custody is in the best interests" of the child. (*LaMusga, supra*, 32 Cal.4th at p. 1078.) "Among the factors that the court ordinarily should consider when deciding whether to modify a custody order in

light of the custodial parent's proposal to change the residence of the child are the following: the children's interest in stability and continuity in the custodial arrangement; the distance of the move; the age of the children; the children's relationship with both parents; the relationship between the parents including, but not limited to, their ability to communicate and cooperate effectively and their willingness to put the interests of the children above their individual interests; the wishes of the children if they are mature enough for such an inquiry to be appropriate; the reasons for the proposed move; and the extent to which the parents currently are sharing custody." (*Id*. at p. 1101.)

The Supreme Court has cautioned that the determination of child custody in move-away cases "is not amenable to inflexible rules." (*LaMusga*, *supra*, 32 Cal.4th at p. 1101.) Indeed, "[t]he trial court enjoys 'wide discretion' to order a custody change based upon a showing of detriment, including detriment caused to the relationship between the noncustodial parent and the child, if such a change is in the best interest of the child in light of all the relevant factors. [Citation.]" (*Brown, supra*, 37 Cal.4th at p. 961.) "That is, a reviewing court generally will leave it to the trial court to assess the detrimental impact of a proposed move in light of other relevant factors in determining what is in the best interest of the child. [Citation.]" (*Ibid*.)

Assuming that A.B. is correct in her assertion that, as B.B.'s primary caretaker, she has a presumptive right to change B.B.'s residence, the trial court applied that presumption when it required that S.B. establish that the proposed move would be so detrimental to B.B. as to justify a reevaluation of the existing custody order. A.B. thus

received the benefit of the presumption that she now claims the trial court should have applied.

In applying the changed circumstance rule, the trial court found that S.B. had met his initial burden to establish that the proposed move would cause B.B. sufficient detriment to require that the court reexamine the custody arrangement. Specifically, the court concluded that the proposed relocation of B.B. to Murrieta "would result in substantial detriment to [B.B.]" because (1) the move would substantially and adversely alter the "quality, consistency and nature of the custodial time and relationship" that B.B. shared with S.B; (2) the move would deprive B.B. of the benefit of having S.B. "involved with his teachers, school and classroom, and of assisting him with his homework and schoolwork on a regular basis as he has consistently done in the past;" (3) the move would remove B.B. from "all of his family members, the majority of whom reside within San Diego County, with the exception of [A.B.] and her immediate family;" (4) the move would separate B.B. from all of the friends and acquaintances he has established; and (5) the move would remove B.B. from the "only academic and social environments" he had experienced.

Once the court determined that S.B. had met his burden to show that B.B. would suffer sufficient detriment to warrant a reexamination of the custody arrangement, A.B.'s presumptive right to relocate the child's residence was overcome, and the court had discretion to determine what custody arrangement would be in the child's best interest. (See *LaMusga*, *supra*, 32 Cal.4th at p. 1098 [noting that "the paramount concern is the

welfare and best interests of the child" such that a "change in custody is 'essential or expedient' . . . if it is in the best interests of the child"].)

A.B. contends that the trial court "made no findings as required by *LaMusga* concerning [the] best interest of the child." (Capitalization omitted.) She acknowledges that the trial court stated that it had considered all of the factors identified in *LaMusga*, but asserts that "[t]he court's statement that it had considered the factors [in] *LaMusga* is not a finding on those factors." The lack of specific findings as to the *LaMusga* factors, she contends, amounts to error. We disagree.[3]

LaMusga does not require that a court make specific findings as to the enunciated factors. Rather, *LaMusga* requires only that the trial court *consider* the factors that the court deemed relevant to a determination as to the child's best interests. (*LaMusga*, *supr*a, 32 Cal.4th 1101 ["Among the factors that the court ordinarily should *consider* when deciding whether to modify a custody order in light of a custodial parent's proposal to change the residence of the child are . . . ." (italics added.)].) The trial court expressly stated that it had considered the *LaMusga* factors. We have no reason to question the

---

3 A.B. also claims that the trial court improperly delegated to S.B., as the prevailing party, the responsibility for "stating the facts that would support the court's decision." The record demonstrates that during the hearing at which the court announced its oral ruling, A.B. requested a formal statement of decision. The court asked A.B. to present a written request setting forth all of the issues that she believed were in contention. After A.B. filed her written request, the court ordered S.B. to prepare a proposed statement of decision, to which A.B. could object. After reviewing the parties' submissions, the court filed its own statement of decision. Rules of Court, rule 3.1590, subdivisions (c), (d), and (e) provide for this procedure. We see no error in the court's application of the procedure in this case. Although S.B. presented the court with suggested findings of fact, the court ultimately determined what findings it would adopt in its final statement of decision.

court's assertion that it considered the relevant factors; in fact, we must presume that the court considered all of the *LaMusga* factors, as well as any other relevant factors, in determining that a change in custody was in B.B.'s best interests. (See *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 ["A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness."].)

Further, the trial court made a number of findings that support its discretionary determination that a change in custody would be in B.B.'s best interests if A.B. decides to go through with her relocation to Murrieta. For example, the court examined the nature of each parent's relationship with B.B., finding that each had a "positive relationship and bond" with B.B., and noting that each had "been actively and consistently involved in providing care for [B.B.] from the date of his birth to the present time." The court also found that either parent would be "suitable to be the primary physical custodial parent." The court did not consider B.B.'s wishes regarding the proposed moved, because, it determined, B.B. was too young to have his wishes taken into consideration.

The court was clearly concerned about the detriment to B.B.'s relationship with S.B. that the proposed move would cause. The court specifically found that the proposed move would "substantially and adversely alter the quality, consistency and nature of " S.B.'s relationship with B.B., and, in particular, would negatively affect S.B.'s ability to help B.B. with his school work and to be involved in B.B.'s classroom and school, as S.B. had done in the past.

The court cited other reasons that caused it to be concerned about whether A.B. would respect and support S.B.'s relationship with B.B. For example, the court was troubled by the fact that A.B. had effectively unilaterally relocated B.B.'s residence outside San Diego County by purchasing a home in Murrieta without first having obtained a court order or S.B.'s permission to relocate the child, as was required under the custody order that was in effect at the time. The court found that A.B. "purchased her home in Murrieta, California, prior to obtaining either the written permission of [S.B.] or an order of the Court granting [her] permission to relocate the minor child to Murrieta, California." The court could reasonably have inferred that in doing so, A.B. had not behaved in a manner that fostered or encouraged S.B.'s relationship with their son, and that it was likely that she would continue to make decisions that would adversely impact that relationship.[4]

The court was "specifically concerned" with the "nature and timing of the allegations" of S.B.'s alleged marijuana use that A.B. and A.B.'s father raised. A.B. first raised concerns about S.B.'s alleged marijuana use after S.B. filed his petition to establish a parental relationship with B.B. However, despite her allegations of S.B.'s marijuana use, A.B. "voluntarily agreed to [S.B.] having substantial, unsupervised custodial time" with B.B. Further, S.B. submitted to the drug testing that the court required, and his test results had repeatedly been negative. During the time between the court's final custody

---

4 This concern was further supported by statements that A.B. made to the FCS mediator to the effect that there were no potential "disadvantages of the child moving" to Murrieta.

determination and the time that A.B. filed her OSC, A.B. had not raised any issue with the court concerning S.B.'s alleged marijuana use. However, after filing the OSC seeking a move-away order, A.B. and her father "again raised marijuana abuse allegations." At the same time, A.B. was arguing that S.B. would actually benefit from the proposed move because it would have allowed him "even more custodial time" with B.B.

Given the timing of A.B.'s allegations, and the fact that she did not seem to be seeking the court's assistance in limiting S.B.'s custodial time or requiring that his visits be supervised, the court did "not consider [A.B.'s] allegations to be well-founded, made in good faith, or to be supported by the evidence." Implicit in the court's findings with respect to A.B.'s allegations of S.B.'s marijuana use is its conclusion that A.B. was not credible as to this matter, and specifically, that she had made unfounded accusations that could have affected S.B.'s custodial time with B.B., thereby demonstrating a disregard for B.B.'s relationship with S.B.

In view of A.B.'s past conduct, the court could have reasonably been concerned that S.B.'s relationship with B.B. would be at risk if A.B. were permitted to relocate B.B. without any change in the custody arrangement. Since the "weight to be accorded to . . . factors [such as the detriment to a child's relationship with his or her father] must be left to the court's sound discretion," the court could properly place great emphasis on the potential detriment to the child's relationship with his father. (*LaMusga*, *supra*, 32 Cal.4th at p. 1093.) Although "a showing that a proposed move will cause detriment to the relationship between the children and the noncustodial parent" will not itself *mandate* a change in custody, it is nevertheless "within the wide discretion of the superior court to

order a change of custody based upon such detriment, if such a change is in the best interests of the children in light of all the relevant factors." (*Id*. at p. 1095.)

LaMusga involved circumstances similar to those in the present case. In *LaMusga*, the trial court had ordered a change in primary custody from the mother to the father upon the mother's request to move the children to Ohio. (*Id*. at pp. 1093-1095.) The Court of Appeal reversed the trial court's order, essentially concluding that the trial court had not applied the presumption that a parent who has primary custody has the right to change the residence of the child, and that the court had not taken into account the "paramount need for stability and continuity in the existing custodial arrangement." (*Id*. at p. 1093.) The Supreme Court rejected the appellate court's analysis, and determined that the trial court had acted well within its discretion in ordering a change of custody. The Supreme Court based its decision in significant part on the detriment to the relationship between the children and their noncustodial father that the proposed move would have caused. (*Id*. at p. 1095.)

Although the proposed move at issue in this case does not involve as great a geographic distance as the proposed move in *LaMusga*, this factor, alone, is not determinative. The Supreme Court has made it clear that " 'bright line rules in this area are inappropriate: each case must be evaluated on its own unique facts. Although the interests of a minor child in the continuity and permanency of custodial placement with the primary caretaker will most often prevail, the trial court, in assessing "prejudice" to the child's welfare as a result of relocating even a distance of 40 or 50 miles, may take into consideration the nature of the child's existing contact with both parents . . . and the

child's age, community ties, and health and educational needs.' " (*LaMusga*, *supra*, 32 Cal.4th. at p. 1089.)

In sum, there is no basis for concluding that the trial court abused its discretion in determining that a custody change would be in B.B.'s best interests, if A.B. moves out of San Diego County.

IV

DISPOSITION

The postjudgment order of the court is affirmed.

AARON, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.